U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: September 25, 2000

CASE NO.: 2000-BLA-168

In the Matter of

WILLIAM LEE HAWKS,
Claimant

v.

ISLAND CREEK COAL COMPANY
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

S. F. Raymond Smith, Esquire
For the Claimant

Mary Rich Maloy, Esquire
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a duplicate claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("Act"), filed on June 24, 1999. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;

2. surviving dependents of coal miners whose death was due to pneumoconiosis ; and,

3. surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis, commonly called "black lung disease" or "coal workers pneumoconiosis"("CWP"), as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

I. PROCEDURAL HISTORY

William Lee Hawks filed his first claim for black lung benefits with the Social Security Administration on June 27, 1973. (DX 26-1).[1] This claim was denied on August 30, 1973. (DX 26-4). On March 27, 1978, Mr. Hawks elected to have his claim reconsidered by the Social Security Administration, which again denied the claim on October 18, 1978 and February 23, 1979. (DX 26-5, 26-6, 26-7). The claim was then forwarded to the Department of Labor for review, and was denied on July 24, 1979 because the existence of pneumoconiosis, total disability, coal mine employment and dependents were not established. (DX 25-1). The Department of Labor denied Mr. Hawks' claim on December 17, 1979, because the evidence did not establish that Mr. Hawks had pneumoconiosis or that he was totally disabled by the disease. (DX 26-11).

The present claim for benefits was filed on June 24, 1999. (DX 1). Island Creek Coal Company was notified as a putative responsible operator on July 30, 1999. (DX 21). The claim was denied by the Department of Labor on September 29, 1999, because the evidence failed to establish that he had pneumoconiosis caused at least in part by his coal mine work or that he was totally disabled by the disease. (DX 18). Mr. Hawks requested a hearing before the Office of Administrative Law Judges on October 6, 1999. (DX 19). Island Creek was again notified on November 3, 1999. (DX 24). I was assigned the case on January 24, 2000.

A hearing was held before the undersigned on June 15, 2000, in Charleston, West Virginia, pursuant to a Notice of Hearing issued on February 9, 2000. Both the claimant and the employer were represented by counsel; no appearance was entered for the Director, Office of Workers' Compensation Programs. Director's exhibits 1 through 26-10, claimant's exhibits 1-3 and employer's exhibits 1-11 were admitted into evidence. (TR 7, 9, 19). In addition, the Director, OWCP submitted an exhibit which was inadvertently omitted from the original Director's exhibits. This document is the December 17, 1979, denial of Mr. Hawks' claim for black lung benefits. It is hereby admitted as Exhibit DX 27.

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[1] The following abbreviations are used herein for reference: DX-Director's Exhibit; CX-Claimant's Exhibit; EX-Employer's Exhibit; TR-Hearing Transcript.

Both the claimant and employer submitted written closing arguments.

II. ISSUES

A. Whether there was a material change in claimant's condition?

B. Whether the miner had pneumoconiosis as defined by the Act and the Regulations?

C. Whether the miner's pneumoconiosis arose out of his coal mine employment?

D. Whether the miner was totally disabled?

E. Whether the miner's disability was due to pneumoconiosis?

III. FINDINGS OF FACT

A. Coal Miner

The claimant testified that he was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for more than 19 years. (TR 13). The employer conceded that he had 18 years of coal mine employment. No evidence being submitted to the contrary, I find Mr. Hawks was a coal miner for at least eighteen years. (TR 7).

B. Date of Filing

The claimant filed his claim for benefits, under the Act, on June 24, 1999. (DX 1). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator

The records establish that Mr. Hawks worked for Island Creek Coal Company from 1953 through 1975, and that he did not have any coal mine employment subsequent to that time. (DX 2, 3, 5, 6, TR11,14). Island Creek is therefore the properly designated responsible coal mine operator in this case, under Subpart F, Part 25 of the Regulations.

D. Dependents

The claimant had two dependents for purposes of augmentation of benefits under the Act, his wife, Josephine and their adopted daughter, Crystal, who was a full time student through May of 2000. (DX 9, 10; TR 16-17).

E. Personal, Employment and Smoking History

William Lee Hawks testified on his own behalf at the June 15, 2000 hearing. He was born on March 22, 1937. He is married to his wife, Josephine, and they have adopted their granddaughter, Crystal G. Hawks, who was born in July of 1977. (TR 16). The Hawks adopted Crystal when she was five years old. Crystal graduated from Marshall College in May of 2000, where she was a full-time student since she graduated from high school. (TR 17).

Mr. Hawks last worked for Island Creek Coal Company in 1975 at its Elk Creek No. 10 mine as a tipple operator. (TR 11). His job duties included lifting and carrying 60-100 pound samples of coal, as well as walking up and down the levels of the tipple. He has not worked in any coal mine employment since 1975. From 1975 through 1998, Mr. Hawks worked in a small retail store in Gilbert, West Virginia. (TR 14). He has not worked since 1998. (TR 16).

The claimant testified that he left his employment with Island Creek due to shortness of breath. (TR 15). He had problems at night, had uncontrollable coughing, and could not do strenuous work without problems. Presently, he has "a lot of difficulties and a lot of embarrassment" in his life because he cannot get around. (TR 15).

Mr. Hawks testified that he has never smoked cigarettes or used tobacco in any form. (TR 17).

IV. MEDICAL EVIDENCE

The following is a summary of the medical evidence submitted in both his prior and most recent claims.

A. Chest X-rays

There were 21 readings of three x-rays, dated July 16, 1999, December 3, 1999, and January 12, 2000, submitted in Mr. Hawks' most recent claim for benefits. The July 16, 1999 film was interpreted as positive by Dr. Ranavaya, who is a B-reader, and negative by Drs. Ranani, Wiot, Spitz and Meyer, who are dually-qualified B-readers and board-certified radiologists, as well as Dr. Gaziano, a B-reader.[2] The December 3, 1999 film was interpreted as positive for pneumoconiosis by

[2] *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 310, n. 3. A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading x-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. §37.51. Courts generally give greater weight to x-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16,

Drs. Aycoth, Ahmed and Pathan, all B-readers, and was interpreted as negative by Drs. Wheeler, Scott, Wiot, Spitz and Perme, who are dually-qualified radiologists and B-readers. Finally, the January 12, 2000 film was interpreted as negative by every physician who read it, including Dr. Zaldivar, a B-reader and board-certified pulmonologist, and Drs. Wiot, Meyer, Spitz, Binns, Abramowitz and Gogineni, who are board-certified radiologists and B-readers.

Exh. #	**Dates 1. x-ray 2. read**	**Physician/ Qualifications**	**Quality**	**Classif-ication**	**Interpretation or Impression**
DX 25-11	1/17/72	Morgan			No definite evidence of pneumoconiosis.
DX 25-9, 10	8/6/79 8/18/79	Subramaniam	Acceptable		Completely negative.
DX 25-8	8/6/79 10/20/79	Dessen B;BCR	2		Completely negative. Film almost unreadable.
DX 17	7/16/99 7/16/99	Ranavaya	1	1/0 p/q 6 zones	
DX 15	7/16/99 8/25/99	Ranani B;BCR	1		Completely negative.
DX 16	7/16/99 9/21/99	Gaziano B	1		Completely negative.
EX 1	7/16/99 1/19/00	Wiot B;BCR	2		Completely negative. No evidence of coal workers' pneumoconiosis.
EX 3	7/16/99 2/6/00	Spitz B;BCR	1		Completely negative. No evidence of simple coal workers' pneumoconiosis.
EX 6	7/16/99 3/31/00	Meyer B;BCR	1		Completely negative. No evidence of coal workers' pneumoconiosis.

108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993). Although not in the record, I take judicial notice that Dr. Ranavaya is a NIOSH-certified B-reader.

Exh. #	Dates 1. x-ray 2. read	Physician/ Qualifications	Quality	Classif- ication	Interpretation or Impression
CX 3	12/3/99 12/8/99	Aycoth B	1	1/0 p/q 6 zones	Pneumoconiosis. Grade A bilateral pleural thickening.
CX 2	12/3/99 12/10/99	Ahmed B	2	1/1 p/p 6 zones	Simple pneumoconiosis. Left pleural thickening in profile, Grade A, extent 1.
CX 1	12/3/99 12/14/99	Pathak B	1	1/0 p/p 6 zones	Simple pneumoconiosis.
EX 9	12/3/99 5/19/00	Wheeler B;BCR	2		Completely negative. Normal except minimal tortuosity descending thoracic aorta and minimal obesity.
EX 9	12/3/99 5/19/00	Scott B;BCR	2		Completely negative.
EX 11	12/3/99 5/23/00	Wiot B;BCR	1		Completely negative. No evidence of coal workers' pneumoconiosis.
EX 11	12/3/99 5/23/00	Spitz B;BCR	1		Completely negative. No evidence of simple coal workers' pneumoconiosis.
EX 11	12/3/99 5/23/00	Perme B;BCR	1		Completely negative. No evidence of coal workers' pneumoconiosis.
EX 2	1/12/00 1/18/00	Zaldivar B;BCP	3		Completely negative.
EX 3	1/12/00 2/9/00	Wiot B;BCR	2		Completely negative. No evidence of coal workers' pneumoconiosis.

Exh. #	Dates 1. x-ray 2. read	Physician/ Qualifications	Quality	Classif- ication	Interpretation or Impression
EX 6	1/12/00 3/12/00	Meyer B;BCR	2		Completely negative. No evidence of coal workers' pneumoconiosis.
EX 6	1/12/00 3/16/00	Spitz B;BCR	2		No evidence of simple coal workers' pneumoconiosis.
EX 8	1/12/00 5/4/00	Binns B;BCR	3		Completely negative. No evidence of occupational pneumoconiosis.
EX 8	1/12/00 5/4/00	Abramowitz B;BCR	3		Completely negative. No conclusive evidence of occupational pneumoconiosis.
EX 8	1/12/00 5/9/00	Gogineni B;BCR	3		Completely negative. No evidence of pneumoconiosis noted.

Shaded areas indicate x-rays taken and/or read prior to the present claim.

* A- A-reader; B- B-reader; BCR- Board-Certified Radiologist; BCP-Board-Certified Pulmonologist; BCI= Board-Certified Internal Medicine; U/R - Unreadable film. Readers who are board certified radiologists and/ or B readers are classified as the most qualified.
** The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest x-ray classified as category 0, including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983). If no categories are chosen, in box 2B(c) of the x-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

B. Pulmonary Function Studies

Pulmonary Function Tests are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician Date Exh.#	**Age Height**	**FEV_1**	**MVV**	**FVC**	**Compre-hension Cooper-ation**	**Qualify* Conform ****	**Dr.'s Impression**
Cabauatan 8/6/79 **DX 25-5**	42 69"	3.56	127		Good Good	No* No**[3]	
Ranavaya 7/16/99 **DX 11**	62 69"	3.03		3.59	Fair Fair	No* No**	Mr. Hawks started hyperventilating and declined further testing. Spirometry is invalid.
Zaldivar 1/12/00 **EX 2**	62 69"	3.12	88	3.81	Poor	No* No**	Normal spirometry. Mild air trapping. Normal diffusion. In spite of all test results being normal, the effort was very poor in all of them.

* A "**qualifying"** pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

** A study "**conforms**" if it complies with applicable quality standards (found in 20 C.F.R. § 718.103(b) and (c)). *See Old Ben Coal Co. v. Battram*, 7 F.3d. 1273, 1276 (7th Cir. 1993). A judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-83 (1984).

For a miner of the claimant's height of 69 inches, § 718.204(c)(1) requires an FEV_1 equal to or less than 1.93 for a male 62 years of age. If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.47 or an MVV equal to or less than 77; or a ratio equal to or less than 55% when the results of the FEV_1 test are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

[3] James R. Castle, M.D., a board-certified internist with sub-specialty in pulmonary disease, found this test invalid because the patient did not exhale for the requisite time in all the studies and the study was not conducted properly. (EX 5). Nevertheless, the FEV1 was normal.

Height	age	FEV_1	FVC	MVV
69"	42	2.26	2.82	90
69"	62	1.93	2.47	77

C. Arterial Blood Gas Studies

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date Ex.#	Physician	pCO_2	pO_2	Qualify	Physician Impression
8/6/79 **DX 25-7**	Cabauaton	31	80	No	
7/16/99 **DX 13**	Ranavaya	38.3	61	Yes	
1/12/00 **EX 2**	Zaldivar	38 28*	93 119*	No No*	Exercise stopped because patient unstable on bicycle.

A lower level of oxygen (O2) compared to carbon dioxide in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.
* Results, if any, after exercise.

D. Physicians' Reports

In connection with a prior claim for benefits, Mr. Hawks was examined on August 6, 1979, by Livia Cabauatan, M.D. (DX 25-6). She noted that Mr. Hawks was clinically asymptomatic at the time of the examination. Dr. Cabauatan diagnosed the claimant with asymptomatic COPD related to dust exposure in his coal mine employment. She also concluded that Mr. Hawks had a moderate respiratory impairment and would be able to do some walking or desk work, but no exertion. Dr. Cabauatan's "remarks" noted that the patient had been asymptomatic for quite sometime and that he was not taking medication for his COPD. She noted there was no cough and had been doing fine since he had worked in his store.

On July 16, 1999, Mr. Hawks was examined by Mohammed I. Ranavaya, M.D. (DX 12). Dr. Ranavaya noted that Mr. Hawks had 20 years of coal mine employment, four of which were underground. He also noted that Mr. Hawks never smoked. Chief complaints were numerous and included daily sputum, wheezing, dyspnea, cough, hemoptysis, tightness in chest, orthopnea in evening,

ankle edema in evening and severe paroxysmal nocturnal dyspnea. Dr. Ranavaya also noted that Mr. Hawks was capable of walking 200 feet on level ground, 100 feet up a gentle incline, climbing 15 stairs, and lifting 40 pounds before becoming short of breath. Based on his occupational exposure to coal mine dust and radiological evidence, Dr. Ranavaya diagnosed Mr. Hawks with pneumoconiosis arising from his coal mine employment. He also concluded that Mr. Hawks had a moderate pulmonary impairment which would prevent him from performing his last coal mine employment on a sustained basis, which impairment was contributed to, "to a major extent" by his pneumoconiosis.

Mr. Hawks was also examined on January 12, 2000 by George L. Zaldivar, M.D., who is a B-reader and board-certified in internal medicine with sub-specialities in pulmonary diseases, sleep disorder and critical care medicine. (EX 2). Dr. Zaldivar also reviewed Mr. Hawks' medical records in connection with his examination. He noted that Mr. Hawks gave poor effort on all his breathing tests and that all the tests were normal despite the poor effort. Dr. Zaldivar concluded that there was not sufficient objective evidence to make a diagnosis of coal workers' pneumoconiosis or any dust disease of the lungs. Furthermore, he found no pulmonary impairment at all, and no pulmonary condition. Rather, Dr. Zaldivar noted that Mr. Hawks was extremely nervous and began to shake all over and his blood pressure became elevated when he attempted to perform his breathing test in Dr. Zaldivar's office. Paramedics were called, but left when Mr. Hawks appeared to be fine. Mr. Hawks attempted to complete the testing, even though he continued to shake. He reported to Dr. Zaldivar that he has trouble with "dead spaces" meaning that he needs to have a fan blowing on him. Dr. Zaldivar diagnosed anxiety, history of shortness of breath, normal examination of the lungs and hypertension at this examination. He explained:

> Even if Mr. Hawks had radiographic pneumoconiosis which in my opinion he does not have, my opinion regarding his pulmonary capacity will stay the same as I have given here. Mr. Hawks does not have any pulmonary impairment whatsoever. The shortness of breath which he has is not due to any pulmonary disease nor [sic] condition. Mr. Hawks appears to be extremely anxious which apparently is the cause of the different "spells" that he had while doing the breathing test in my office.

Dr. Zaldivar was deposed regarding his findings on May 15, 2000. (EX 10). He explained that his physical examination of Mr. Hawks was normal, except for Mr. Hawks' nervousness and anxiety. He explained that anxiety will cause shortness of breath by causing hyperventilation. He reiterated that he found no x-ray evidence of pneumoconiosis, that the pulmonary function tests, diffusing capacity, and arterial blood gases were normal. He testified that Mr. Hawks did not have any pulmonary disease. With regard to the blood gas tests taken by Dr. Ranavaya on 7/16/99, Dr. Zaldivar explained that Dr. Ranavaya did not do an exercise blood

gas test, which in Dr. Zaldivar's case indicated that the blood gases were entirely normal. He felt that

Dr. Ranavaya did not have sufficient information on which to base a diagnosis of a moderate impairment. In fact, Dr. Zaldivar concluded that Mr. Hawks had no pulmonary impairment at all.

Gregory J. Fino, M.D., who is a B-reader and board-certified in internal medicine with a sub-specialty in pulmonary disease, reviewed Mr. Hawks' medical records and submitted a consultative result dated March 20, 2000. (EX 4). Dr. Fino noted that the mild hypoxia found on the July 16, 1999 arterial blood gas study was due to obesity, noting that Mr. Hawks was 69" tall and weighed 208 pounds. Dr. Fino concluded that Mr. Hawks did not suffer from pneumoconiosis or any occupationally acquired pulmonary condition as a result of coal mine dust exposure, based on the majority of negative chest x-ray readings, normal valid spirometric evaluations with no obstruction, restriction or ventilatory impairment, normal MVV, normal diffusing capacity ruling out the existence of clinically significant pulmonary fibrosis, and the lack of impairment in oxygen transfer. Dr. Fino noted that such objective tests are absolutely essential in distinguishing pneumoconiosis from non-occupational pulmonary disorders. Dr. Fino also concluded that Mr. Hawks pulmonary system was normal from a functional standpoint and retained the physiologic capacity to perform all the requirements of his last job, even assuming heavy labor. This conclusion was based on the normal spirometry, normal diffusing capacity, arterial blood gases at rest and after exercise showing no significant hypoxia or any significant impairment in oxygen transfer, and normal MVV. Even assuming the existence of pneumoconiosis, he still opined that Mr. Hawks had no respiratory impairment and was neither partially nor totally disabled from returning to his last coal mine employment.

James R. Castle, M.D. also submitted a consultative report based on his examination of Mr. Hawks' medical records. (EX 5). Dr. Castle is board-certified in internal medicine with a sub-specialty in pulmonary disease, as well as a B-reader. Dr. Castle concluded that Mr. Hawks did not have coal workers' pneumoconiosis because he did not have the physical, radiographic or physiologic findings, or the arterial blood gas findings, to indicate the presence of that disease process. He explained that the 7/16/99 arterial blood gas findings of a pO2 of 61 could not be due to pneumoconiosis because later tests performed by Dr. Zaldivar were normal. Given that hypoxemia caused by pneumoconiosis is permanent and irreversible, the earlier findings could not have been due to pneumoconiosis. Dr. Castle also opined that Mr. Hawks was not totally and permanently disabled as a result of any pulmonary process including coal workers' pneumoconiosis. In fact, he found that Mr. Hawks had no impairment of the respiratory nature from any cause whatsoever.

On April 25, 2000, Lawrence Repsher, M.D., who is board-certified in internal medicine with sub-specialties in pulmonary disease and critical care, as well as a B-reader, submitted a consultative report based on his review of the medical records. (EX 7). He noted that the majority of x-ray films were negative for pneumoconiosis, and found to be completely negative. Dr. Repsher concluded that Mr. Hawks does not, nor has he ever, suffered from coal workers' pneumoconiosis or any other pulmonary or respiratory disease, either caused by or aggravated by his employment as a coal miner. His opinion was based on no x-ray, pulmonary function, arterial blood gas or exercise test evidence of pneumoconiosis, as well as the fact that Mr. Hawks had documented anxiety and somatization,

manifested by recurrent hyperventilation syndrome. He considered this a psychiatric condition, unrelated to coal mine employment or exposure to coal mine dust. He found Mr. Hawks fully fit from a respiratory standpoint to do his usual coal mine work without restriction.

E. Other

A general disability determination by a state or other agency is not binding on the Department of Labor with regard to a claim filed under Part C, but the determination may be used as some evidence of disability or rejected as irrelevant at the discretion of the fact-finder. *Schegan v. Waste Management & Processors, Inc.*, 18 B.L.R. 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 B.L.R. 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-1157 (1984) (opinion by the West Virginia Occupational Pneumoconiosis Board of a "15% pulmonary functional impairment" is relevant to disability but not binding). *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988). Mr. Hawks apparently filed a claim for workers' compensation benefits with the state of West Virginia, however, as far as the record and Mr. Hawks' testimony indicate, no ruling was ever made and Mr. Hawks never received any benefits from the state. (DX 1, 8, TR 17).

V. CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish each of the following elements by a preponderance of the evidence: (1) he has pneumoconiosis; (2) his pneumoconiosis arose from coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. *20 C.F.R. §§ 718.202-718.205; Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(en banc); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(en banc)*; Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). *See also Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

B. Material Change in Conditions

Since the present claim was filed more than one year after the denial of his previous claim, the claimant must initially show there has been a material change in his condition. The duplicate claims regulation, 20 C.F.R. § 725.309(d), directs that new claims shall be denied based on

the earlier denial absent a threshold showing of a material change in the claimant's conditions.[4]

The Fourth Circuit follows the so-called "one-element" standard for determining if a material change in conditions has occurred, which requires the claimant to prove, under all of the probative medical evidence of his condition *after* the prior denial, both favorable and unfavorable, at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996). *See also Labelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994). Unlike the Sixth Circuit in *Sharondale*, however, the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee*, 86 F.3d at 1363 n. 11. The Administrative Law Judge ("ALJ") must simply determine whether the new evidence, in and of itself, establishes any one of the elements previously adjudicated against the miner in a previous claim. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. The ALJ must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits.

The Claimant's previous application for benefits was denied by the Department of Labor on December 17, 1979, because the evidence did not establish that Mr. Hawks had pneumoconiosis caused at least in part by his coal mine employment, or that he was totally disabled by the disease. (DX 27). As such, every element of Mr. Hawks' prior claim was denied.

Based on the evidence submitted since the denial of the claimant's previous claim, and as discussed in detail *infra*, I find that Mr. Hawks has not established the existence of any element of entitlement to black lung benefits under the Act. As such, he has not established a material change in his condition and his claim must be denied.

C. Existence of Pneumoconiosis

30 U.S.C. § 902(b) and 20 C.F.R. §718.201 define pneumoconiosis as a "a chronic dust

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[4] Section 725.309(d) provides, in pertinent part:

> In the case of a claimant who files more than one claim for benefits under this part, . . . [i]f the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the [Director] determines there has been a material change in conditions . . . (Emphasis added).

disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. §718.201. The term "arising out of coal mine employment" is defined as "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

"...[T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) citing, *Rose v. Clinchfield Coal Co.*, 614 F. 2d 936, 938 (4th Cir. 1980). Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995).

The claimant has the initial burden of proving that he suffers from coal workers' pneumoconiosis arising out of coal mine employment. 20 C.F.R. § 718.202, 718.203, 718.204. He may establish the existence of pneumoconiosis by any one of four methods: (1) a chest x-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a).[5]

The Fourth Circuit recently held that, in making a determination as to the existence of pneumoconiosis, an administrative law judge must weigh all the evidence together under 20 C.F.R. § 718.202(a) to determine whether a miner suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). In doing so, the court reasoned:

> [Weighing all of the relevant evidence together makes common sense. Otherwise, the existence of pneumoconiosis could be found even though the evidence as a whole clearly weighed against such a finding. For example, suppose x-ray evidence indicated that the miner has pneumoconiosis, but autopsy evidence established that the miner did not have any sort of lung disease caused by coal dust exposure. In such a situation, if

[5] There is no biopsy or autopsy evidence in the record, nor is there any claim that Mr. Hawks suffered from complicated pneumoconiosis. As such, these sub-sections are moot with respect to Mr. Hawks' claim for benefits.

> each type of evidence were evaluated only within a particular subsection of § 718.202(a) to which it related, the x-ray evidence could support an award for benefits in spite of the fact that more probative evidence established that benefits were not due.

Compton, Slip. op. at 4. As such, the evidence of record under each of the subsections of §718.202(a) will be considered together in making a determination as to the existence of pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence. 20 C.F.R. § 718.202(a)(1). "[W]here two or more x-ray reports are in conflict, in evaluating such x-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays." *Id.; Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985)." (Fact one is board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991) at 1-37. Readers who are board certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985).

There were 21 readings of three x-rays, dated July 16, 1999, December 3, 1999, and January 12, 2000, submitted in Mr. Hawks' most recent claim for benefits. Of them, four were read as positive for simple pneumoconiosis, while the remainder were read as completely negative films. While a judge is not required to defer to the numerical superiority of x-ray evidence, although it is within his or her discretion to do so. *Wilt v. Woverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990).

The July 16, 1999 film was interpreted as positive by Dr. Ranavaya, who is a B-reader, and negative by Drs. Ranani, Wiot, Spitz and Meyer, who are dually-qualified B-readers and board-certified radiologists, as well as Dr. Gaziano, a B-reader. The December 3, 1999 film was interpreted as positive for pneumoconiosis by Drs. Aycoth, Ahmed and Pathan, all B-readers, and was interpreted as negative by Drs. Wheeler, Scott, Wiot, Spitz and Perme, who are dually-qualified radiologists and B-readers. Finally, the January 12, 2000 film was interpreted as negative by every physician who read it, including Dr. Zaldivar, a B-reader and board-certified pulmonologist, and Drs. Wiot, Meyer, Spitz, Binns, Abramowitz and Gogineni, who are board-certified radiologists and B-readers.

It is notable that no dually-qualified B-reader/radiologist found any chest x-ray to be positive for pneumoconiosis. In fact, the most recent x-ray film was read by every physician who interpreted it as completely negative.[6] Given that such a dually-qualified physician's opinion is entitled to the greatest

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[6] *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 21 B.L.R. 2-302, 137 F.3d 799, (4th Cir., Mar. 3, 1998). Here the Court Noted that pneumoconiosis is a progressive and irreversible disease such that it is proper to accord greater weight to later positive x-ray studies over earlier negative ones. Generally, "later evidence is more likely to show the miner's current

weight, I find that Mr. Hawks has not established, by a preponderance of the radiographic evidence, the existence of pneumoconiosis. *See Cranor v. Peabody Coal Co.*, ___ B.L.R. ___, BRB No. 97-1668 BLA (Oct. 29, 1999).

A determination of the existence of pneumoconiosis can also be made if a physician, exercising sound medical judgment, based upon certain clinical data and medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative x-ray. 20 C.F.R. § 718.202(a). As with the x-ray evidence, more weight is generally given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); *Call v. Director, OWCP*, 2 B.L.R. 1-146 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). In this matter, Mr. Hawks was personally examined by two physicians, Dr. Ranavaya and Dr. Zaldivar. In addition, there were three consultative reports submitted based on reviews of his medical records, from Drs. Fino, Castle and Repsher.

The only physician who found that Mr. Hawks suffered from coal workers' pneumoconiosis, or any condition arising from his coal mine employment, was Dr. Ranavaya. His report specifically noted that the diagnosis of pneumoconiosis was based on Mr. Hawks' history of exposure to coal mine dust and his reading of the x-ray. However, as noted above, the x-ray taken on the date of Dr. Ranavaya's examination, July 16, 1999, was interpreted as completely negative by four dually-qualified radiologist/B-readers and one B-reader. A history of coal mine dust exposure, without more, is not sufficient evidence upon which to base a diagnosis of coal workers' pneumoconiosis. I give lesser weight to Dr. Ranavaya's diagnosis of pneumoconiosis because I find it is not supported by the underlying objective medical data *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

Furthermore, because physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled, I give greater weight to the conclusions of Dr. Zaldivar, a board-certified pulmonary specialist. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

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condition" where it is consistent in demonstrating a worsening of the miner's condition.

Bailey v. U.S. Steel Mining Co., 21 B.L.R. 1-152, BRB Nos. 97-1447 BLA & 97-1447 BLA-A (July 22, 1999) (*Recon. En banc).* Improper to apply the "later evidence" rule where "all the interpretations of the most recent x-rays are negative and the second most reent x-ray taken on June 11, 1991 had conflicting interpretations." The Board concluded that, on remand the judge must analyze the evidence without reference to "its chronological relationship" but should consider the radiological qualifications of the physicians.

Finally, Dr. Zaldivar's finding that Mr. Hawks did not have pneumoconiosis, is further bolstered by the reports of Drs. Fino, Castle and Repsher, all of whom are board-certified internists with sub-specialties in pulmonary diseases. Even though these consulting physicians did not personally examine Mr. Hawks, a non-examining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidation Coal Co.*, 7 B.L.R. 1-582 (1984).

Weighing all of the evidence together under Section 718.202(a), I find that Mr. Hawks has not established the existence of pneumoconiosis by a preponderance of the evidence.

D. Cause of pneumoconiosis

Once the miner is found to have pneumoconiosis, the claimant must show it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). Since Mr. Hawks had more than ten years or more of coal mine employment, he would ordinarily receive the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. However, in view of my finding that the existence of CWP has not been proven this issue is moot.

E. Existence of total disability

The claimant must show he is totally disabled from performing his most recent coal mine work or some other gainful employment requiring similar skills. 20 C.F.R. § 718.204(b). Sections 718.204(c)(1) through (c)(5) set forth criteria for establishing total disability: (1) pulmonary function studies with qualifying values; (2) blood gas studies with qualifying values; (3) evidence the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment; and (5) lay testimony.[7] Under this subsection, the ALJ must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the ALJ must assign the evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986, aff'd on reconsideration en banc, 9 B.L.R. 1-236 (1987).

Section 718.204(c)(1) provides that a pulmonary function test may establish total disability if its

[7] Section 718.204(c)(3) is not applicable because there is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. § 718.204(c)(5) is not applicable because lay testimony is permitted only in survivor's claim in the absence of medical evidence.

values are equal to or less than those listed in Appendix B of Part 718. All of the pulmonary function studies in this record, despite their technical invalidity, reported non-qualifying results. As such, the claimant has failed to establish total disability under this sub-section.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(c)(2). The resting arterial blood gas study performed by Dr. Ranavaya on July 16, 1999, was qualifying for total disability. (DX 13). However, no blood gas test was performed after exercise. More recently, Dr. Zaldivar performed both resting and arterial blood gas studies on January 12, 2000, which results were within normal limits and non-qualifying for total disability under the Regulations. (EX 2). According to Dr. Zaldivar, a board-certified pulmonology specialist, the most recent exercise blood gas test indicated that Mr. Hawks' blood gases were entirely normal. (EX 10). Based on Dr. Zaldivar's credentials, in addition to the fact that he performed an exercise arterial blood gas test which resulted in more accurate results, I find that Mr. Hawks has not established the existence of total disability by way of arterial blood gas studies.

Where total disability cannot be established through ventilatory or blood gas studies, it may be demonstrated if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(c)(4). Under this subsection, "...all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Camp Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the burden of proving otherwise falls upon the party opposing entitlement. *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

Again, the only physician in the record who found that Mr. Hawks had <u>any</u> respiratory disability whatsoever was Dr. Ranavaya, who diagnosed a moderate pulmonary impairment which would prevent him from performing his last coal mine employment. While a mild or moderate impairment can be totally disabling, I do not find this to be the case with regard to Mr. Hawks. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48 (1986), *aff'd on recon. en banc*, 9 B.L.R. 1-104 (1986); *Klouser v. Hegins Mining Company*, 6 B.L.R. 1-110, 1-113-114 (1983). Dr. Ranavaya does not state the basis for his diagnosis of a moderate pulmonary impairment. Indeed, the pulmonary function studies he performed were normal. In addition, as discussed above, the fact that Dr. Ranavaya did not perform exercise arterial blood gas tests makes his results less thorough that those subsequently performed by Dr. Zaldivar. As Dr. Zaldivar explained at his deposition, Dr. Ranavaya did not have sufficient evidence upon which to base his opinion that Mr. Hawks had a moderate respiratory impairment. Dr.

Zaldivar concluded, to that contrary, that he had no pulmonary impairment at all. This conclusion was again bolstered by those of Drs. Fino, Castle and Repsher, all board-certified pulmonologists.

I find that Mr. Hawks has not established, by a preponderance of the evidence, that he is totally disabled from performing his last coal mine employment, as defined by Section 718.204(c).

F. Cause of total disability

The Board requires that pneumoconiosis be a "contributing cause" of the miner's disability. *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(*en banc), overruling Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988). Likewise, the Fourth Circuit Court of Appeals requires that pneumoconiosis be a "contributing cause" to claimant's total disability. *Toler v. Eastern Associated Coal Co.*, 43 F. 3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

"A claimant must be totally disabled due to pneumoconiosis and any other respiratory or pulmonary disease, not due to other non-respiratory or non-pulmonary ailments, in order to qualify for benefits." *Beatty v. Danri Corp. & Triangle Enterprises*, 16 B.L.R. 1-11 (1991) aff'd 49 F.3d 993 (3rd Cir. 1995) *accord Jewel Smokeless Coal Corp.* (One whose disability is only 10% attributable to pneumoconiosis would be unable to recover benefits if his completely unrelated physical problems (i.e., stroke) created 90% of his total disability). The fact that a physician does not explain how he could distinguish between disability due to coal mining and cigarette smoking or refer to evidence which supports his total disability opinion, may make his opinion "unreasoned." *Gilliam v. G&O Coal Co.*, 7 B.L.R. 1-59 (1984). If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990).

In light of my findings that Mr. Hawks has not established the existence of pneumoconiosis, nor is he totally disabled, this issue of causation is moot. It is further noted that Dr. Ranavaya is the only physician who attributed any pulmonary impairment to Mr. Hawks' coal mine employment or pneumoconiosis and, as discussed *supra*, his report is given lesser weight as it is not well-supported by the objective medical evidence of record. *White v. Director, OWCP*, 6 B R 1-368 (1983).

VI. ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act

prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has not established that a material change in conditions has taken place since the previous denial. The evidence does not establish the existence of pneumoconiosis by a preponderance of the evidence, as defined by the Act and Regulations. Furthermore, the claimant has not established that he is totally disabled. He is therefore not entitled to benefits.

ORDER

It is ordered that the claim of WILLIAM LEE HAWKS for benefits under the Black Lung Benefits Act is hereby DENIED.

RICHARD A. MORGAN
Administrative Law Judge

RAM:KM:dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits review Board within 30 days from the date of this Order by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, at the Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.